UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LINDY WATKINS,	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. H-06-1753
	§	
HENRY PAULSEN, SECRETARY	§	
OF THE TREASURY,	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

This Title VII federal employment case is before the court on defendant's motion for summary judgment and motion to dismiss (Dkt. 13).[1] The court recommends that defendant's motion for summary judgment be granted.

Background

Plaintiff Lindy Watkins, a black female born in 1953, is a tax compliance officer for the Internal Revenue Service in Houston. She brings this lawsuit primarily to challenge a mediocre performance evaluation she received in 2004.

Watkins's supervisor from 1995 until December 2006 was Leslie Anderson, a white female born in 1949.[2] Anderson was responsible for completing annual performance reviews of Watkins. For the fiscal year June 1, 2001 through May 31, 2002, Anderson gave Watkins

---

[1] The district court referred this case to this magistrate judge for pretrial management (Dkt. 3). The court heard oral argument on April 23, 2008.

[2] For reasons not reflected in the record, Anderson ceased being Watkins's supervisor in December 2006. Defendant's Ex. 4, ¶ 3.

a "critical job element" (CJE) score of 4.4.[3] For the fiscal year ending May 31, 2003, Anderson assessed Watkins performance as "exceeds fully successful" and gave her a CJE score of 4.0. For the fiscal year ending May 31, 2004, Anderson lowered Watkins's performance rating to "fully successful" and gave her a CJE score of 3.0.

Watkins filed an EEO administrative complaint on September 17, 2004 alleging that Anderson discriminated against her on the basis of age, race, and sex and in reprisal for prior EEO activity[4] by giving Watkins the lower CJE score of 3.0 in 2004. After her claim was administratively denied, Watkins filed this lawsuit under Title VII and the Age Discrimination in Employment Act asserting race, sex and age discrimination, retaliation, and hostile work environment, as well as numerous common law tort claims.

Defendant moves to dismiss plaintiff's tort claims as preempted by Title VII and barred by the Civil Service Reform Act. Plaintiff has voluntarily withdrawn her claims for intentional infliction of emotional distress, libel, slander, defamation, and negligent hiring

---

[3] The "critical job element" score has 5 "aspects": 1-employee satisfaction, 2-customer satisfaction (knowledge), 3-customer satisfaction (application), 4-business results (quality), and 5-business results (efficiency). Defendant's Ex. 12. Each aspect is scored from 1 to 5 and the total is averaged to calculate the CJE score. Thus, the highest possible CJE is 5.

[4] Watkins filed an EEO complaint in July 2002 challenging her fiscal year 2002 evaluations. Her July 2002 complaint was resolved through mediation. Watkins filed an EEO complaint in September 2003 challenging her fiscal year 2003 evaluation. That complaint resulted in a final agency determination of no discrimination, which was affirmed by the EEOC. Watkins apparently did not file a federal lawsuit based on either the July 2002 or September 2003 EEO complaints.

and promotion.[5] Thus, the court recommends plaintiff's tort claims be dismissed and defendant's motion to dismiss be denied as moot.

Watkins does contest the summary judgment motion on her discrimination and retaliation claims, but for reasons explained below her response fails to raise a genuine issue of material fact, and the motion should be granted.

Summary Judgment Standards

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001). "An issue is material if its resolution could affect the outcome of the action." *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.,* 290 F.3d 303, 310 (5th Cir. 2002). If the movant meets this burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)).

---

[5] Plaintiff's response, Dkt. 21, at 24.

If the evidence presented to rebut the summary judgment is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the nonmoving party. *Id.* at 255.

Analysis

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148-49 (2000), succinctly summarizes the appropriate inquiry for analyzing summary judgment motions in employment discrimination cases :

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

The court must draw all reasonable inferences in favor of the non-movant, and disregard all evidence favorable to the moving party that the jury is not required to believe. *Id.* at 150-51. Trial courts should not treat discrimination differently than other ultimate questions of fact for purposes of Rule 50 or 56. *Id.* at 148.

1. Race, Sex, and Age Discrimination

Defendant argues that Watkins cannot create a jury issue of discrimination based on race, sex, or age,[6] because (a) she has not suffered an adverse employment action, and (b)

---

[6] Age discrimination under the ADEA is analyzed under the same analytical framework as Title VII discrimination. *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 252 n.3 (5th Cir. (continued...)

she cannot raise any inference of discrimination based on disparate treatment of similarly situated employees outside of her protected class.

Ultimate Employment Decision. The issue here is whether a disappointing performance evaluation is an actionable "ultimate employment decision" under Title VII or the ADEA. Recent Supreme Court decisions have cast some doubt on Fifth Circuit precedent limiting the scope of actionable Title VII discrimination claims to "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." *Felton v. Polles,* 315 F.3d 470, 486 (5th Cir. 2002). In *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 126 S. Ct. 2405, 2415 (2006), the Supreme Court expressly abrogated this approach in the retaliation context, expanding the definition of adverse employment action to include any action that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." Earlier decisions of the Court in *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), had raised the question whether the Fifth Circuit's threshold for actionable employment discrimination had been lowered. *See Pegram v. Honeywell, Inc.,* 361 F.3d 272, 282 n.8 (5th Cir. 2004). Last year the Fifth Circuit declared that *Burlington Northern's* broad definition of adverse employment action applies only to retaliation claims, and that Fifth Circuit precedent concerning "ultimate employment decisions" remains

---

[6] (...continued)
1996).

controlling for Title VII *discrimination* claims. *McCoy v. City of Shreveport,* 492 F.3d 551, 560 (5th Cir. 2007).

Notwithstanding *McCoy*, some questions remain, as illustrated by defendant's own motion, which relies almost exclusively on Fifth Circuit retaliation cases such as *Mattern*. Are those cases to be regarded as good law on the issue of adverse employment action, despite the fact that their holdings are contrary to *Burlington Northern*? Or is it permissible to rely only upon Fifth Circuit *discrimination* cases addressing the ultimate employment decision issue?

And if retaliation cases such as *Mattern* are still viable, what are we to make of *Mattern's* reliance upon the textual differences in the respective Title VII proscriptions against employment discrimination and retaliation? According to *Mattern,* Title VII's anti-retaliation clause has a narrower reach than the anti-discrimination clause.[7] The former does not include the general prohibition against limiting or classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." 42 U.S.C. § 2000e-2(a)(2). Because the anti-retaliation provision of § 2000e-3 makes "no mention of the vague harms contemplated in § 2000e-2(a)(2), . . . this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions." *Mattern,* 104 F.3d at 709. In

---

[7] By contrast, in *Burlington Northern* the Supreme Court indicated that the anti-retaliation provision was broader than the anti-discrimination provision, at least insofar as the former was not limited to discriminatory actions affecting terms and conditions of employment. 126 S. Ct. at 2413.

other words, part of *Mattern's* rationale was that discrimination claims may extend to a broader range of employment decisions than retaliation claims. To that extent, Fifth Circuit retaliation precedent may be more problematic than helpful for defendant's motion.

A discrimination claim was asserted in the other case principally relied upon by defendant, *Dollis v. Rubin,* 77 F.3d 777 (5th Cir. 1995), but the case is distinguishable. Dollis, who also happened to be a Treasury Department employee, claimed that her request for a "desk audit" was denied due to her race and sex, and that this denial restricted her promotional opportunities. A desk audit is a determination by a personnel specialist whether the job in question is classified at the proper GS level. In fact, a desk audit was conducted a year after her request, and its conclusion was that her job had been properly classified as a GS 11 rather than a GS 12 as Dollis had contended. The court concluded that denial of the requested desk audit did not adversely affect her employment. *Id.* at 782.

Unlike Dollis, Watkins is complaining of an adverse performance evaluation. She alleges that her 2004 evaluation is actionable because:

> [Watkins] was several years from retirement and her retirement depends on her 'high three' years before retirement. The action of Supervisor Anderson did not lack final consequences. Not only did the action affect her retirement amount, but also it prevented [Watkins] from getting promotions and performance awards, and caused [Watkins] to be disqualified from transferring out of Supervisor Leslie Anderson's group, and away from her harasser.[8]

Assuming there were evidence to support these assertions, there is precedent in the Fifth Circuit arguably supporting Watkins's theory that a discriminatory evaluation may

---

[8] Plaintiff's response, at 14.

sometimes be actionable.[9] In *Vaughn v. Edel*, 918 F.2d 517, 522 (5th Cir. 1990), the plaintiff was terminated for cost-reduction reasons after she received the lowest ranking in her department. Despite this facially legitimate basis for termination, the employer was held to have discriminated against Vaughn by failing to criticize or counsel her when her work was unsatisfactory, thereby denying her the same opportunity to improve that white employees were afforded. The Fifth Circuit expressly held that such conduct "limited or classified" Vaughn in a way which would either "tend to deprive [her] of employment opportunities or otherwise adversely affect [her] status as an employee," in violation of § 2000e-2(a)(2). *Vaughn* arguably supports the proposition that, in certain circumstances, disparate performance evaluations may constitute an actionable adverse employment action.

Unlike the plaintiff in *Vaughn,* Watkins has not been discharged. Nor has she provided evidence of any adverse effect from her "fully successful" rating. Despite her conclusory allegations, Watkins has not shown that she has been denied any promotion, award, or transfer due to her 2004 evaluation, or even that her salary was negatively impacted. Nor does she present evidence reflecting the alleged effect of her evaluation on the amount she will receive in retirement. Absent such evidence, Watkins fails to satisfy the current Fifth Circuit test for an actionable adverse employment decision, even under *Vaughn's* more expansive view of § 2000e-2(a)(2).

---

[9] It seems clear that if the evaluation had an immediate, direct impact on her compensation or benefits, it would qualify as an ultimate employment decision. *Pegram*, 361 F.3d at 282; *cf. Mattern*, 104 F.3d at 708-09. But Watkins does not make such a clearcut allegation.

Even if her mediocre performance evaluation were actionable under Title VII or the ADEA, Watkins's claims fail for a more fundamental reason – no evidence of discriminatory intent, as shown below.

Disparate Treatment. Dissimilar treatment of similarly situated employees outside of a plaintiff's protected group is an accepted method of proving a Title VII violation. *See Nieto v. L&H Packing Co.,* 108 F.3d 621, 623 n.5 (5th Cir. 1997). In this case, Watkins has identified two younger males, Ernest Sanders born in 1956 and Alex Weibel-Valls born in 1960, as comparators for purposes of showing disparate treatment.[10]

Watkins cannot show that Sanders and Weibel-Valls were treated more favorably than she was treated. Watkins alleges that Sanders and Weibel-Valls "were given clear feedback for the purpose of improving their performance. I was not given clear feedback."[11] Yet, Watkins has not presented evidence that Sanders and Weibel-Valls were given any feedback, much less more feedback than her, during the 2004 review period. Moreover, the evidence establishes that Watkins was given extensive feedback throughout the 2003-04 rating period.[12] Watkins's reliance on an August 2003 statement by Anderson's boss, Territory

---

[10] Watkins does not identify the race of Sanders or Weibel-Valls, and this alone dooms her race discrimination claim. Sanders may be "Employee E," identified in defendant's motion as a black male born in 1956. Defendant's motion, at 10. Defendant assumes Weibel-Valls is "Employee C," identified in defendant's motion as a hispanic male born in 1961. Defendant's reply, at 4. But Watkins states that Weible-Valls was born in 1960, so the court cannot assume that Employee C is Weibel-Valls.

[11] Affidavit of Lindy Watkins, ¶ 8 (Dkt. 21-2).

[12] *See* Defendant's Exs. 22-46. Watkins's case is also distinguishable from *Vaughn* in this (continued...)

Manager Philip Gonzalez, that "Anderson did not follow through and provide feedback to [Watkins] that clearly addressed her Critical Job Element performance" is misplaced because it relates to a prior review period that is not at issue.[13] In addition, all of Watkins's co-workers received lower annual CJE scores in 2004 than 2003;[14] there is no indication in the record that she was singled out for different treatment. Finally, there is simply no evidence in the record of Anderson's discriminatory animus. Anderson never made comments regarding Watkins's race, sex, or age nor is there evidence that she had discriminated against others.[15] In short, nothing in the record before the court supports an inference of discrimination.

2. Retaliation

In order to establish retaliation, Watkins must show that she participated in an activity protected by Title VII, that defendant took an adverse employment action against her, and that a causal connection exists between the protected activity and the adverse employment action. *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007). In a retaliation case,

---

12 (...continued)
important regard.

13 Plaintiff's Ex. B. The court overrules defendant's hearsay objection to plaintiff's Exhibit B, (defendant's reply, at 3) but the document does not create a fact issue on any material issue in this case.

14 Defendant's Ex. 12.

15 Despite Watkins's various assertions that Anderson screamed at her and humiliated her, she never alleges that Anderson's harassment included racist, sexist, or ageist comments. *See* Affidavit of Lindy Watkins (Dkt. 21-2).

an adverse employment action is one "that a reasonable employee would have found . . . materially adverse, which in this context means it well might have dissuaded a reasonable worker from making a charge of discrimination." *Id.* at 559; *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2415 (2006). Ultimately, Watkins must prove that the adverse employment action would not have occurred but for her protected conduct. *Strong v. University Healthcare Sys., L.L.C.*, 482 F.3d 802, 806 (5th Cir. 2007).

Watkins cannot show any causal connection between her protected activity of filing EEO complaints beginning in July 2002, and her lowered CJE score in May 2004. Temporal proximity between protected activity and an adverse employment action may support an inference of retaliation when the gap is suspiciously close. *See Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001)(20-month gap does not suggest causation). But the lengthy 22 month gap here is not suspicious. *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (10- month lapse "suggests that a retaliatory motive was highly unlikely"). In fact, the timing of relevant events in this case points against retaliation. Watkins received a high CJE score of 4.0 and a rating of "exceeds expectations" in May 2003, 10 months after her July 2002 filing; and Anderson begin giving Watkins interim notices of decreased performance levels on critical job elements in July 2003, a year after the July 2002 filing and two months *before* the September 2003 filing.[16]

---

[16] Defendant's Ex. 23.

Watkins has presented no evidence of Anderson's allegedly retaliatory motive. As noted above, all of Watkins's co-workers received lower annual CJE scores in 2004 than in 2003. Anderson testified that she based Watkins's evaluation on seventeen case reviews, fifteen inventory reviews, and three miscellaneous items, all of which were summarized in a Recordation Worksheet. Watkins makes a conclusory accusation that Anderson falsified the Recordation Worksheet, but points out no specific errors in that document. Nor does Watkins point out any errors in the calculation of her 2004 CJE score. Watkins was given a performance plan in October 2003, and received frequent feedback on her performance during the 2004 fiscal year, all of which supports her CJE score of 3.0.[17]

Plaintiff has offered nothing more than her subjective belief that retaliation occurred. Watkins relies heavily on an August 21, 2003 EEO interview of Anderson's boss, Territory Manager Phillip Gonzalez .[18] As noted above, Gonzalez's statements in August 2003 do not relate to the review period at issue in this case. But even at that time, Gonzalez explained that he would not consider raising Watkins's score because Anderson's evaluation was fully supported by her Recordation Worksheet. Gonzalez's interview does not warrant an inference of retaliation.

---

[17] Defendant's Exs. 22-46.

[18] Plaintiff's Ex. B.

Anderson denies considering new procedures on which Watkins had not been trained in making her performance evaluation of Watkins, and there is no evidence to the contrary.[19] Watkins cites agency documents indicating that employees were not to be evaluated based on newly adopted procedures regarding the Office Examination Process until after training[20] However, this evidence Watkins merely shows that the agency adopted new procedures; it does not show that Anderson improperly used the new procedures in her 2004 evaluation of Watkins.

Watkins's affidavit describes other purported malfeasance in the way Anderson conducted the fiscal year 2004 evaluation. These allegations are too vague and conclusory to constitute even a scintilla of evidence of retaliation.[21] *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 345-46 (5th Cir. 2007) ("Conclusory statements are not competent evidence to defeat summary judgment."); *Rios v. Rossotti*, 252 F.3d 375, 380-81 (5th Cir. 2001) (a jury could not reasonably conclude that an affidavit unsupported by precise evidence of the incidents of retaliation alleged demonstrates pretext); *Lechuga v. Southern Pacific Transp. Co.*, 949 F.2d 790, 798 (5th Cir. 1992) ("Conclusory statements in an affidavit do not provide facts that will counter summary judgment evidence."). Other of her contentions

---

19 Declaration of Leslie D. Anderson, defendant's Ex. 4, ¶¶ 4, 6.

20 Plaintiff's Exs. D, E.

21 *See* Watkins's affidavit (Dkt. 21-2).

have no foundation in personal knowledge and are not corroborated by other evidence in the record.[22] Defendant is entitled to summary judgment on Watkins's retaliation claim.

3. Hostile Work Environment/Exhaustion

Watkins contends that Anderson subjected her to a hostile work environment between 2002 and 2004 because of her age[23] and in retaliation for filing EEO complaints. Defendant contends that Watkins has not exhausted her administrative remedies on these hostile work environment claims.

Watkins has not responded to defendant's exhaustion argument.[24] Employees, including federal employees, must exhaust administrative remedies before bringing an action pursuant to Title VII in federal district court.[25] *Pacheco v. Mineto*, 448 F.3d 783, 788 (5th Cir. 2006) (as a precondition to seeking judicial relief, complaining employees must file a charge of discrimination with the EEO division of their agency). The scope of the exhaustion requirement is the same for both federal and private sector employees. *Id.* at 788 n.6. "Failure to exhaust is not a procedural 'gotcha' issue. It is a mainstay of proper enforcement of Title VII remedies." *McClain v. Lufkin Indus., Inc.,* 519 F.3d 264, 272 (5th Cir. 2008). The scope of the administrative claims govern the scope of the judicial claims. "Courts

---

22 *See* Watkins aff., ¶14 (regarding the number of cases other workers were required to pick up).

23 The court notes that Anderson is four years older than Watkins.

24 Neither party addresses the legal requirements for a hostile work environment claim.

25 Federal regulations govern the administrative processing of a formal complaint of discrimination by a federal employee. 29 C.F.R. § 1614.105 *et seq*.

should not condone lawsuits that exceed the scope of EEOC exhaustion because doing so would thwart the administrative process and peremptorily substitute litigation for conciliation." *Id.* at 273.

The court construes Watkins's September 17, 2004 administrative complaint broadly to determine whether a hostile work environment claim could reasonably be expected to grow out of her charges of discrimination and reprisal. Watkins September 2004 complaint alleges that she was treated differently than other employees on June 22, 2004 when her "evaluation was lowered to a 3.0 without justification."[26] Defendant's EEO director gave Watkins notice that this was the scope of the claim to be investigated.[27] There is nothing in the EEO administrative record that gives any indication that Watkins felt she had been subjected to a hostile work environment due to her age or her prior EEO activity.[28]

---

[26] Defendant's Ex. 1.

[27] Defendant's Ex. 2.

[28] Watkins's affidavit includes the following allegations of acts that created a hostile work environment, none of which are even hinted at in her September 17, 2004 EEO complaint:

> During the years 2002 through 2004, my Supervisor Leslie Anderson humiliated me when she did not allow me to participate in group meeting(s). ¶ 4.
>
> During the years 2002 through 2004, my Supervisor Leslie Anderson humiliated me many times when she screamed at me in front of other co-workers. ¶ 5.
>
> During the period 2002 through 2004, Supervisor Leslie Anderson made my work environment unbearable for me. ¶ 6.
>
> In 2003, Supervisor Leslie Anderson screamed at me when I asked her for instructions and/or directions for my work. ¶ 9.

(continued...)

Therefore, defendant's motion to dismiss Watkins's hostile work environment claim should be granted.

Conclusion

For the reasons discussed above, the court recommends that defendant's motion for summary judgment (Dkt. 13) be granted. The court further recommends that defendant's motion to dismiss (Dkt. 13) be granted in part and denied in part as moot. Watkins's complaint should be dismissed in its entirety.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas on April 29, 2008.

Stephen Wm Smith
United States Magistrate Judge

---

[28] (...continued)
During the period from 2002 through 2004, Supervisor Leslie Anderson generally froze me out of the group by totally ignoring me in group meetings. ¶ 10.

Supervisor Leslie Anderson harassed me at home by telephone on my days off, by calling me for no good reason. ¶ 15.